IN THE

Supreme Court of the United States

October Term, 1942

No. 28

THE WASHINGTON TERMINAL COMPANY,

Petitioner,

vs.

F. E. BOSWELL ET AL.,

Respondents.

ADDITIONAL BRIEF OF RESPONDENTS

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ADDITIONAL BRIEF OF RESPONDENTS

Preliminary Statement

The order of the Court restoring this case to the docket for reargument and for the filing of further briefs directs the attention of the parties to four stated questions which we are asked to consider. These questions probe deeply into the nature of the National Railroad Adjustment Board, its decisions and the procedure available for their review. The matters dealt with are such as to cause us to interpret the Court's order as a request to discuss the whole subject fully and to examine its various phases on the basis of such general principles of law as may be applicable.

The ensuing discussion will proceed according to this interpretation of the Court's intent. In our consideration of the questions asked, we will first discuss each in a general way and will then relate the conclusions reached to the special facts of this case.

ARGUMENT

FIRST QUESTION:

Whether Either Party to a Dispute Over Which the Adjustment Board Has Authority Is Precluded From Seeking a Determination of the Dispute by the Courts, Either Before or After Submission of the Dispute to the Board.

Right to Seek Judicial Determination Before Submission to the Adjustment Board

Provisions of the Statute. The language of the Railway Labor Act is inconclusive on this point. It does contain the provision that "disputes *may* be referred * * * to the Adjustment Board." (Section 3 First (i), U. S. C. Title 45, Section 153 First (i).) This language is obviously evidence of an intention on the part of Congress that resort to the Board shall be optional in some sense. The option intended, however, may be that of proceeding with the case or of dropping it. There is nothing in the language which compels the conclusion that an option was intended as between the Adjustment Board and the courts. Under the circumstances, therefore, the statutory language cannot be said to be decisive.

We have examined the congressional proceedings which led up to the passage of the Railway Labor Act and find nothing therein which casts any light on this issue.

It follows that the Court's First Question will necessarily be answered on the basis of general principles of law related to the inherent purposes of the Railway Labor Act.

Doctrine of Primary Jurisdiction—Its Legal Basis. This doctrine, which requires resort to administrative remedies under certain circumstances where such remedies are made available (but not mandatory) by statute, was first announced in the case

of *Texas & Pacific Railroad Company vs. Abilene Cotton Oil Company*, 204 U. S. 426. The cited case was a reparation action brought pursuant to the Interstate Commerce Act and involved the reasonableness of a rate published in accordance with that statute. A defense was made by the carrier to the effect that the only remedy available to the shipper was through a complaint addressed to the Interstate Commerce Commission. The court held that the effect of the court action if allowed, would necessarily be a judicial determination of the validity of the rate. Such a determination could not be of wider application than the territorial jurisdiction of the court, and if courts generally were allowed to enter this field, the whole scheme of uniformity of regulation of interstate rates contemplated by the Interstate Commerce Act would be nullified. The classical statement of the origin of the primary jurisdiction rule is, that a claimant will be required to resort to administrative proceedings (subject to later review in the courts) where such action is required by consideration of uniformity of regulation.

Another reason for the rule has been found in the nature of the issues frequently involved in administrative proceedings. Where such issues are of a complicated or technical nature to the extent that they require for their proper solution, the informed judgment of a board of experts, primary resort to such a board is required. See *Great Northern Railroad Company vs. Merchants Elevator Company*, 259 U. S. 285; *Board of Railroad Commissioners vs. Great Northern Railroad Company*, 281 U. S. 412; *United States Navigation Company vs. Cunard Steamship Company*, 284 U. S. 478; *Rochester Telephone Corporation vs. United States*, 307 U. S. 125; Vom Baur, "Federal Administrative Law," pp. 193-6; Stason, "Timing of Judicial Redress from Erroneous Administrative Action," 25 Minn. Law Rev. 560; 42 American Jurisprudence 698.

This doctrine, though originating in cases involving the Interstate Commerce Commission, has been applied to other agencies of the government as circumstances have required. The primary jurisdiction of the United States Shipping Board was recognized in the case of *United States Navigation Company vs. Cunard Steamship Company, supra.* The rule has also been recognized in certain District Court cases involving labor disputes arising while the National Industrial Recovery Act was in effect. In the case of *Stanley vs. Peabody Coal Company,* 5 F. Supp. 612, it was held that it was necessary to resort to the administrative remedy provided by the Bituminous Coal Labor Board organized under a Code, before taking any action in court. To the same effect, see *Western Powder Manufacturing Company vs. Interstate Coal Company,* 5 F. Supp. 619.*

Thus, the general rule is that an administrative agency established for the purpose of deciding controversies of a certain type will be held to have primary jurisdiction over all such controversies, first, where uniformity of regulation is essential to the realization of the purpose of the statute and such uniformity can be secured only by resort to the administrative agency in question, and second, where the controversies involved are such that they present issues of a technical nature which may be best decided by a special expert tribunal established for that purpose. In the ensuing discussion, we will point out that the National Railroad Adjustment Board falls within both reasons for the rule.

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* The doctrine of primary jurisdiction of administrative agencies in labor dispute cases was recognized by the Norris-LaGuardia, or Anti-Injunction Act, U. S. C. Title 29, Section 108, where the jurisdiction of the federal courts to issue injunctions in labor disputes is limited thus:

"No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration."

Purposes of the Railway Labor Act—Uniformity of Regulation.

As was recognized by this court in the case of *Virginian Railway Company vs System Federation No. 40*, 300 U. S. 515, the purpose of the Railway Labor Act is to prevent labor disputes whose effect may be the disruption of interstate commerce.

The industry to which the Act applies is a highly integrated one. The court is, of course, aware of the extent to which the various units of the American railroad system are physically dependent upon one another for the performance of a nation-wide transportation service. In addition to this physical connection, however, the industry is unified in other respects. Rates and many other operating and financial practices are subject to the centralized control of the Interstate Commerce Commission acting under the Interstate Commerce Act.

An industry-wide annuity system for the benefit of superannuated and unemployed workers is provided by the Railroad Retirement Act (U. S. C. Title 45, Sec. 228a-228r) and the Railroad Unemployment Insurance Act (U. S. C. Title 45, Sec. 351-367), to the support of which all railroads and railroad employees jointly contribute.

Railroad workers are nearly 100 per cent organized on a horizontal basis, in national or international unions. The wages of most classes of employees, with a few minor exceptions, have been standardized throughout the industry, and have moved upward or downward together in response to negotiations and agreements national in scope.*

In addition to wages certain other conditions of employment are established on a national basis. In 1936, 21 labor organizations and the majority of the carriers entered into a joint agreement for the protection of railroad

* For a historical account of these national fluctuations in wages, see the report to the President by the Emergency Board appointed September 10, 1941, under Section 10 of the Railway Labor Act, pp. 10-12, inc.

labor from the adverse effects of consolidation.* In 1941, the policy of granting paid vacations to certain classes of employees was inaugurated on substantially all of the carriers by a single master agreement executed as a result of a report of the 1941 Emergency Board appointed in that year.

Other working conditions of employees are still largely governed by agreements executed by individual carriers and the collective bargaining representatives of the various classes of their employees. Such agreements are effective on a system-wide basis, and in the case of a large railroad, may have an extended coverage territorially and be operative in many states. There is furthermore a high degree of similarity among the various agreements. Certain provisions are considered as standard and are incorporated in most of them.

This standardization in the treatment of railroad employees has not been a fortuitous development but has come about naturally as a result of the integration of the industry, the similarity in the operating conditions under which its various units function, and a unity of representation among employees of the same class. It has been found as a matter of practical experience that a lack of uniformity of treatment of employees performing identical work under identical circumstances for the same or different employers sooner or later breeds discontent and labor unrest.

It is obvious that a lack of uniformity in the rights and duties of employees may be brought about not only by differences in the provisions of collective bargaining agreements but also by differences in the interpretation of agreements which are themselves uniform, or substantially uniform, in their terms.

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* See comment on this agreement contained in the opinion of this court in the case of *United States vs. Lowden*, 308 U. S. 225, 234.

There is ample evidence in the congressional proceedings which transpired prior to the enactment of the Railway Labor Act that the sponsors of that statute were perfectly well aware of this situation and endeavored to make provision for it. The carriers objected to the proposal of a national board of adjustment and suggested instead the establishment of system or regional boards. Mr. Joseph B. Eastman, the Federal Coordinator of Transportation under the Emergency Transportation Act of 1930, assisted in the preparation of the bill and appeared before the committees of Congress in support of it. The suggestion of the carriers was opposed by Mr. Eastman for reasons which will be apparent from the following excerpts copied from his testimony:

> "I also have the feeling that the national board will have a very distinct advantage, because it can establish certain precedents of general application which should furnish a guide for deciding cases locally. As a matter of fact, the same rules are now interpreted in many different ways throughout the country, and that is one reason why grievances which arise remain unsettled, because there is disagreement as to what the same language means and a great variety of interpretations. If we had one board, nation-wide, setting precedents in these matters, I think the tendency would be to establish guides which would enable a great many of the issues to be settled at home." (page 48, Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 73d Congress, 2d session, H. R. 7650.)
>
> "Finally, I believe that the consideration of these minor disputes from a national viewpoint instead of a strictly local viewpoint will have advantages which will more than offset its disadvantages. This will be particularly true in the case of interpretations of rules and working conditions. There is, I believe, no sound occasion for the multiplicity of interpretations which now seems to exist, and if some greater degree of uniformity can be attained by national

consideration, the tendency will gradually be to reduce the number of debatable disputes. Precedents will mean something, whereas they now often mean little or nothing." (page 19, Hearings before the Committee on Interstate Commerce, United States Senate, 73d Congress, 2d Session, S. 3266.)

It is true that Mr. Eastman was speaking of a national board in contrast to system or regional boards, and was not referring directly to the courts. System or regional boards, however, at the worst, would affect entire systems or groups of systems. The jurisdiction of the courts would not be even that extensive. Actions seeking the construction of contracts, even though between interstate carriers and their employees fall within the jurisdiction of the state courts (see *Moore vs. Illinois Central*, 312 U. S. 630) unless diversity of citizenship exists. Almost without exception the major railroad systems of the country traverse several states and of course the whole railroad network operates in every state. If collective bargaining agreements are to be subject to interpretation by the courts of the various states, there would be no assurance of uniformity even on the property of a single carrier, and obviously anything like nation-wide uniformity would be impossible.

It must be remembered that the Railway Labor Act did not establish the National Railroad Adjustment Board as an end in itself but as a means to an end. The ultimate purpose was that of providing for the minimization of labor disputes in the railroad industry and of the danger of interruption or impairment of interstate commerce as a result of such disputes. Uniformity of treatment of employees working under similar conditions of employment was recognized by the proponents of the Act as a necessary feature of any system designed to accomplish this statutory purpose. Such uniformity cannot be secured through resort to the courts, but can be secured if the par-

ties are required to submit their cases to the National Railroad Adjustment Board.

We conclude, therefore, that if the statutory purpose of eliminating labor disputes in this industry is to be fulfilled, a uniform standard of interpretation of collective bargaining agreements must be provided through the operation of some single agency. The National Railroad Adjustment Board is the only agency able to bring about such a result. It follows, therefore, that this Board falls squarely within the first requirement of the "primary jurisdiction" rule, *i.e.*, that resort to an administrative agency should be mandatory wherever such a course is required in order to effect uniformity of regulation essential to the attainment of a basic statutory purpose.

Purposes of the Railway Labor Act—Technical Questions Requiring Decision by Expert Administrators.

As noted above, where the subject matter to be considered in any controversy is so technical or complicated as to require specialized information on the part of the tribunal handling it, the doctrine of primary jurisdiction of administrative agencies is peculiarly applicable. Cases involving the interpretation of railroad collective bargaining agreements clearly fall within this reason for the rule.

As stated by Mr. Lloyd K. Garrison in his article, "The National Railroad Adjustment Board, A Unique Administrative Agency," 46 Yale L. J. 567*

> "The railroad world is like a state within a state. Its population of some three million, if we include the families of workers, has its own customs and its own vocabulary, and lives according to rules of its own making."

* Reproduced in document "Inquiry of Attorney General's Committee on Administrative Procedure, Relating to the National Railroad Adjustment Board," Appendix pp. 110-135. Copies of this document were submitted to the court by petitioner's counsel during the first hearing.

The rules of the industry, insofar as labor relations are concerned, have been generally incorporated into collective bargaining agreements. The interpretation of such agreements is a complicated task, the complication being due to a number of factors. In the first place, it must be borne in mind that collective bargaining on the railroads has been in progress since well back in the last century. Unlike most long continued contractual relationships, this one, until recently, has been conducted without any considerable assistance from attorneys or courts. Collective bargaining agreements were considered by both parties to depend for their enforcement upon economic rather than legal sanctions. Presently existing collective agreements, therefore, are seldom set up in the form of comprehensive contracts. Their language is not that of the lawyer but of the railroader. Expressions of consideration and mutual obligation are absent. Often these agreements are incomplete and must be interpreted by reference to the whole underlying history of labor relations as embodied in earlier agreements or in negotiations, disputes, lay interpretations, compromises, and the accepted but unwritten customs of the industry. For example, seniority rights are among the most prized rights of railroad employees. "Seniority" is recognized in almost every collective agreement, yet we have never seen such an agreement which purports to define the term, the obvious reason being that its meaning is so well understood that definition is considered unnecessary. (The contract involved in this case, which is printed in the record at page 33, *et seq.*, will illustrate these points.)

One prominent commentator, when speaking of the National Railroad Adjustment Board, has made the following statement as to the nature of the questions presented to it:

> "One may ask, is it necessary to maintain such elaborate machinery for the interpretation of agreements? The answer is yes, and as I shall attempt to show, the machinery is not quite elaborate enough.

There are in existence on the 859 carriers covered by the Railway Labor Act over 3,000 separate agreements with labor organizations, of which over 2,300 are on the Class I railroads. Each of these agreements consists of many clauses and thousands of words, defining in language not always clear, jobs, duties, hours, overtime, seniority rights, discipline procedure, leaves, vacations, wage rates and so forth. Disputes are constantly arising; what does this particular clause mean as applied to this particular set of facts? Or, if the meaning is clear, what are the facts which give rise to this particular claim? Sometimes both the meaning and the facts are in dispute. There may be precedents but they too are often in dispute.

"Someone has got to decide these disputes, after they have been handled all the way up to the top of the carrier-union hierarchies and no agreement has been reached. They cannot be left to fester. There are too many of them and the stakes are too great. Law courts are not the answer. There must be tribunals specially adapted to the requirements of the industry, and able to work swiftly, simply, and expertly."*

The regular members of the Adjustment Board are railroad officials and officials of railroad labor organizations. They are familiar from long experience with the language and background of railroad labor agreements and with the customs of the industry. Whether an individual case is decided by these regular members alone or with the assistance of an outside referee, nevertheless the services of technically expert administrators are at all times available to advise and assist in the decision.

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* Garrison, "Labor Relations in the Railroad Industry," reprinted on page 104 of Appendix to a document entitled "Inquiry of the Attorney General's Committee on Administrative Procedure Relating to the National Railroad Adjustment Board," supplied to the court by counsel for the petitioner during the original hearing.

Further see a discussion by this same author in his article, "The National Railroad Adjustment Board, A Unique Administrative Agency," reprinted in the Appendix referred to above, p. 110. The excerpt to which the court's attention is directed is on pages 125-129.

Hence, we submit that the second basis of the primary jurisdiction rule is met, *i. e.*, that resort must be had to an available administrative agency where the character of the controversy is such that the services of techincally expert administrators are required for its solution.

Summary Summarizing the above discussion, we have seen that the primary jurisdiction doctrine is particularly applicable to situations where uniformity of regulation is essential, and can be secured only by requiring all cases to be submitted to a central administrative agency, and further, where the character of the issues submitted is such as to call for a degree of technical knowledge not possessed by the courts. Both of these factors being operative in the case of the National Railroad Adjustment Board, it follows that the doctrine of primary jurisdiction is fully applicable to this tribunal.

Our original brief was predicated upon the assumption that the decision of this court in the case of *Moore vs. Illinois Central Railroad*, 312 U. S. 630, precluded any contention on our part to the effect that the procedure established by the Railway Labor Act for the adjustment of certain types of disputes between carriers and employees was an exclusive procedure in its administrative phase. Even on this assumption, however, we pointed out that the judicial phase of the statutory procedure should be considered as exclusive and as precluding any non-statutory review at the suit of a carrier for the reason that any other conclusion would deny to the employees certain rights which are granted to them by the Railway Labor Act, which are essential features of the purpose of that statute, and which are exercisable only in the course of statutory review actions. Obviously if it is now held that the statute intended to establish in the National Railroad Adjustment Board exclusive jurisdiction over the type of disputes with which it

was established to deal, it follows even more conclusively that the whole statutory plan must be followed, without deviation, to its conclusion, and that an extra-statutory method of review is not available to a carrier against which an award has been issued.

Analysis of Decision Moore vs. Ill. Central

We realize, of course, that the above conclusion is not in conformity with that of this court in the case of *Moore vs. Illinois Central Railroad Company*, and we feel accordingly that we should examine briefly the basis upon which that decision is predicated.

In the course of its opinion, the court called attention to the fact that Section 3 First (i) of the Railway Labor Act "provides no more than that 'disputes may be referred * * * to the * * * Adjustment Board'." The court contrasts this language with that of the earlier act of 1926, which used the word "shall" in connection with the submission of disputes to adjustment boards (whose establishment was authorized and recommended but not compelled by that statute), but concluded that the change in phraseology was designed to effectuate a clarification of statutory purpose rather than a change thereof. The court said accordingly:

> "* * * neither the original 1926 Act, nor the Act as amended in 1934, indicates that the machinery provided for settling disputes was based on a philosophy of legal compulsion. On the contrary, the legislative history of the Railway Labor Act shows a consistent purpose on the part of Congress to establish and maintain a system for peaceful adjustment and mediation voluntary in its nature." (Pages 635-6.)

While this conclusion is entirely accurate with respect to the provisions of the Transportation Act of 1920, Title

III (41 Stat. L. 469), and the Railway Labor Act of 1926 (44 Stat. L. 578), definite elements of legal compulsion were incorporated into the Act of 1934.* The Transportation Act of 1920 provided very briefly for the voluntary establishment of adjustment boards. The parties undoubtedly had the right to do this in any event, and the whole effect of the statute was to place a governmental stamp of approval on the procedure and to correlate the activities of such boards, if formed, with those of the United States Railroad Labor Board. No provision was made as to how the members of such boards were to be selected, the procedure under which they were to operate, or the effect which should be given to their decisions.**

The 1926 statute went considerably farther than the Transportation Act in the particularity with which it outlined the Adjustment Board process, but did not compel the establishment of any such boards. It did provide that "boards of adjustment shall be created by agreement," and stated what such agreements should contain if made, but did not actually compel them. Under this statute, bi-partisan boards consisting of representatives of each side in equal numbers were specified, procedure was outlined, formal decisions were mentioned, and it was provided that such decisions should be "final and binding upon both parties to the dispute."† The Railway Labor Act of 1926, therefore, may be summarized as saying to the carriers and to the employees, "You do not need to create adjustment boards, but if you do create them, your contract must contain certain provisions." It is obvious that no real compulsion was exerted but that the statute merely declared

* The historical development of the adjustment board idea is traced in respondents' original brief, pages 20-31, and will not be repeated here.

** For text of this portion of the Transportation Act, see footnote on page 27 of respondents' original brief.

† For the text of this portion of the Railway Labor Act of 1926 see footnote, page 29, of respondents' original brief.

federal policy which it was hoped would be effectuated by private contract.

The significance of the change made by the 1934 Act may best be appreciated by a consideration of the facts which made change necessary. The employees had become dissatisfied with the operation of a purely voluntary system of adjustment boards, and the investigations of the Federal Coordinator of Transportation, Mr. Eastman, had established that there was sound basis for this attitude. In sponsoring the bill before Congress, Mr. Eastman explained the weaknesses in the existing system thus:

> "The Railway Labor Act now provides that boards of adjustment 'shall be created by agreement between any carrier or groups of carriers, or the carriers as a whole, and/or their employees.' You will note that the duty thus imposed is definite and positive. The law also prescribes the procedure under which adjustment boards shall act, and makes their decisions final and binding on both parties to the dispute."
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> * * * * * *
>
> "The fact is, however, that this obligation which the law imposed has largely been disregarded. No national boards of adjustment have been created, and there are only four regional boards, and all but one of these were in existence prior to the Railway Labor Act. These regional boards are confined to the train service, and by no means all of the carriers participate in them. There are a considerable number of system boards of adjustment in various of the crafts, but these also are sporadic, and some railroads participate in no boards of adjustment whatsoever."
>
> * * * * * *
>
> "Another difficulty with the present law, even where an adjustment board has been established, is that, although its decisions are final and binding upon both parties, there can be no certainty that there will be a decision. The two sides are now evenly represented on these boards, and hence deadlocks are a very distinct possibility. Not only are they possible,

but they have occurred in a large number of cases, and of late there has been a continually growing tendency toward such deadlocks. The number now existing runs into the hundreds."

* * * * * *

"Provision is also made so that deadlocks will be impossible. When the regular members, who will be equally divided between the two sides, disagree, they must call in a neutral member appointed by the mediation board to decide the case. The willingness of the employees to agree to such a provision is, in my judgment, a very important concession and one of which full advantage should be taken in the public interest. I regard it as, perhaps, the most important part of the bill." (Pp. 45-47, Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 73d Congress, 2d Session, H. R. 7650.)

Thus, the new Act which was proposed was designed to accomplish two significant results: first, the adjustment board procedure was to be continued in the form of a national board whose establishment was mandatory (voluntary boards were to be permitted but only by mutual consent of the parties which could be withdrawn by either on 90 days' notice), and second, deadlocks in this national board were to be prevented by the appointment of neutral referees. These two considerations, particularly when supported by the enforcement provisions of Section 3 First (p), added for the first time a definite compulsory element to the adjustment board concept.

It should be noted that the 1934 Act was able to state many of the obligations intended to be imposed in language substantially the same as that used in the 1926 Act, where the required conditions of contracts for the establishment of adjustment boards are set forth. This is explained by the fact that both acts contemplated legal obligations, the one, however, to be imposed by private contract, the other, by the statute itself. The essential difference obviously

lies in the fact that, while the one Act left the door open for either of the parties to subject itself to legal obligation or not, as it chose, the later statute gave no such option.

Thus, the Railway Labor Act of 1934 added features of decision and compulsion to a type of proceeding which theretofore had been purely negotiative and voluntary. The opportunity is still given to utilize the voluntary procedure with mutual consent. The failure to secure such consent under the 1926 Act resulted in an entire absence of any adjustment procedure on the carrier involved, while today such failure results in subjecting the parties to the mandatory procedure of the National Railroad Adjustment Board. It is respectfully submitted, therefore, that the 1934 Act did alter the basic characteristics of the system theretofore existing and that insofar as the decision in *Moore vs. Illinois Central* is predicated upon a contrary hypothesis, it should be reconsidered by the court at this time.

In partial answer to the Court's First Question, therefore, we conclude that the primary jurisdiction rule is applicable to the Adjustment Board, and that neither party to a dispute which might be submitted to that Board may seek a judicial determination of such dispute prior to such submission.

Right to Seek Judicial Determination After Submission to the Adjustment Board

In our original brief filed herein, we advanced the proposition that a carrier against whom an award of the Adjustment Board is issued may not, as plaintiff, apply to the courts for a re-determination of the dispute. Such a carrier has access to the courts but only as a defendant in an enforcement action brought under Section 3 First (p). The reasons supporting this position, having been

fully developed in our former brief, will not be repeated here.

The right of employees to resort to the courts to enforce an award favorable to them is specifically granted by Section 3 First (p) and requires no discussion. As to the possible right of employees to seek judicial relief from an unfavorable award, see our discussion of the Court's Fourth Question herein, in the course of which it will be pointed out that if employees are required to take their disputes to the Adjustment Board and have no right of election in the first instance between the administrative procedure offered by the Act and judicial relief in the courts, then under the Federal Constitution, they probably have a right to judicial review.

As to the second phase of the First Question, therefore, it is our position that after a case has been submitted to the Adjustment Board, a carrier may secure, but may not seek, judicial review; that employees may seek judicial relief in an enforcement action wherein the legal rights of both employees and carrier will be considered, and may possibly be able to secure judicial review of an award against them, their right being dependent upon the answer finally reached as to the question of whether the primary jurisdiction rule does or does not apply to this Board.

Intermediate Statement

The answers to be given to the second, third and fourth questions asked by the court must depend in large measure upon the decision reached as to the first question. The rights of parties to resort to the courts and the scope of judicial review where these parties are required to submit themselves to administrative procedure in the first instance differ materially from the rights which may be properly asserted by them if they had the privilege of electing whether to follow the administrative or the judicial channel.

We have taken the position in this brief that no right of election exists but that the doctrine of primary jurisdiction is applicable to the National Railroad Adjustment Board. In the ensuing discussion, we will point out the consequences of this position in relation to the other three questions of the court, but will also outline the conclusions which we believe would necessarily follow were the contrary view to be accepted.

We feel that the discussion of the remaining questions suggested by the court may be more clearly presented by changing somewhat their order of consideration. We will accordingly treat the fourth question next, and follow this by a discussion of the third and second questions, in that order.

FOURTH QUESTION:

The Effect of the Words "Final and Binding" in Section 3 First (m) Upon the Right to Resort to the Courts and Upon the Scope of Judicial Review, (a) During the Two-Year Period, and (b) After Expiration of the Two-Year Period.

In considering this question, we wish, in the first place, to direct the court's attention to certain general considerations which will aid in the correct interpretation of the statutory phrase in question. Thereafter we will consider this phrase in relation to, *first*, its effect in relation to any right of review which may be open to employees faced with an unfavorable award of the Board; *second*, its effect as restricting a carrier's right of review to that provided in an enforcement action brought under Section 3 First (p); *third*, its effect in limiting the scope of review in an enforcement action, and *fourth*, its effect after the two-year period of limitations has expired.

GENERAL CONSIDERATIONS REGARDING INTERPRETATION

The legislative proceedings prior to the enactment of the Railway Labor Act serve to cast some light upon the sense in which the phrase "final and binding" was used by Congress. In the hearings before the Committee on Interstate and Foreign Commerce of the House of Representatives, 73d Congress, 2d Session, H. R. 7650, Mr. Joseph B. Eastman discussed at some length the significance of this expression. The entire discussion is too lengthy to be copied here in full, but is set forth in an appendix to this brief. The most significant short excerpt is to be found on page 60 of the transcript of the hearings, and reads as follows:

> "Mr. Cooper. Do I understand this paragraph then on page 17, in which it says, 'the awards shall be final and binding upon both parties to disputes,' would that prevent a railroad employee or an organization from striking, if they saw fit? Would it be a violation of the law if they did that?
>
> Mr. Pettengill. Could an injunction issue to prevent them from doing it?
>
> Commissioner Eastman. I cannot tell you what the legal procedures would be in enforcing the award, where it is against the employee. Paragraph (p) covers the case where a carrier does not comply with the order of the adjustment board.
>
> Mr. Cooper. Would it apply to either carrier and/or employees? Now, if we go that far are we not writing something new into the law of the land to deprive the employees of rights which they already had?
>
> Commissioner Eastman. Well, as I say, you have exactly similar provisions in the present labor act with respect to decisions by adjustment boards and where they agree to arbitration, and this law is in effect an agreement on the part of the parties to arbitrate all of these minor disputes.
>
> The Chairman. Was that not one of the reasons, to try to keep down strikes to get people together?
>
> Commissioner Eastman. Yes. It is a very im-

portant part of it. The willingness of the employees to agree to a provision of that sort seemed to me to be a very important and praiseworthy thing."

It appears from this discussion that the question of the *employees'* right to attack an unfavorable award of the Adjustment Board was considered almost entirely on the assumption that any action which they might take would be economic rather than judicial in nature. It was Mr. Eastman's conclusion that the employees were willing to agree to abide by any awards of the Board and would not resort to strikes against adverse awards. This concession seemed to him so significant that the question of judicial review at the suit of employees was scarcely mentioned.

It may fairly be concluded, therefore, that it was the intent of Congress that awards of the Adjustment Board were to be absolutely final and binding upon the parties in an *economic* sense. As far as the language used in Section 3 First (m) is concerned, there is nothing to indicate that Congress did not also intend to impute to such awards absolute legal finality as well. However, it is well established that such a degree of finality cannot ordinarily be attached to any administrative finding where *quasi*-judicial issues are involved and legal rights determined without infringing upon the requirements of the Federal Constitution.* Further it is well established as well that no statute will be interpreted in such manner as to cast doubts upon its constitutional validity where another interpretation is possible.**

Accordingly, in light of the rather sweeping language of the statute, and in light of the legal principles above stated, it may fairly be concluded that it was the intent

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* See *Ex Parte Young*, 209 U. S. 123; *Wadley Southern Ry. Co. vs. Georgia*, 235 U. S. 651; *Natural Gas Pipeline Co. vs. Slattery*, 302 U. S. 300.

** See *Northwestern Bell Telephone Co. vs. Nebraska State Railway Comm.*, 297 U. S. 471, 480, and *Richmond Screw Anchor Co. vs. United States*, 275 U. S. 331, 346.

of Congress to endow the awards of the Board with the highest degree of finality consistent with the requirements of the Constitution. These requirements appear to differ materially according to whether resort to the Board is considered as elective or compulsory in the first instance. We will, therefore, develop the various factors relating to this problem from both points of view.

Effect of Phrase "Final and Binding" in Relation to Right to and Scope of Review of Award Unfavorable to Employees

If employees have an option as to whether they shall invoke the services of the Adjustment Board or the processes of the courts and elect to pursue their administrative remedy, then they may properly be held to have waived their right to a judicial review. If they secure an award against the carrier but not as favorable a one as they considered themselves entitled to receive. They may not ignore the award and sue on the contract, but are limited to their statutory action for the enforcement of the award. This conclusion appears to follow inescapably from the decision of this court in the case of *Baltimore and Ohio Railroad Company vs. Brady*, 288 U. S. 448. The cited case arose out of a reparation award made by the Interstate Commerce Commission where, in an enforcement action, the claimant endeavored to recover a sum greater than the amount of the award.* The court said that "Having elected to seek relief through the Commission, plaintiff is not entitled to recover more than the amount of the award" (page 457), and further that the plaintiff was "bound by the award" (page 458).**

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* It will be recalled that the provisions of the Railway Labor Act for the enforcement of Adjustment Board awards are practically identical with those of the Interstate Commerce Act for the enforcement of reparation awards.

** To the same effect see *Illinois Central R. Co. vs. Peery*, 242 U. S. 288, and *Terminal Warehouse Co. vs. Pennsylvania R. Co.*, 297 U. S. 500.

If a claimant is thus "bound" and may not challenge an award in his favor because of alleged insufficiency, it follows logically that he would be equally bound by an award which was entirely adverse to him. It appears, therefore, that if the employees have an election, choose to follow the administrative course, and consider themselves aggrieved by the result, they are nevertheless bound thereby and may not seek relief in the courts.

If, however, we take the position that the employees have no election in the first place, but are required to take their disputes to the Adjustment Board, the reasons underlying the above stated conclusion do not apply. If an award of the Board were to be considered as absolutely final and binding under such circumstances, the employees would be denied all opportunity to test asserted legal rights in court, and doubts would be cast upon the constitutionality of the statute. Accordingly, following our original premise, that Congress intended that awards should have as high a degree of finality as constitutionally possible, it follows that, if the primary jurisdiction doctrine is applied, awards of the Board could be construed as possessing administrative finality only. Administrative finality has been defined by this court as requiring that "even when resort to courts may be had to review a commission's order, the range of issues open to review is narrow. Only questions affecting constitutional power, statutory authority, and the basic prerequisites of proof can be raised." *Rochester Telephone Corporation vs. United States*, 307 U. S. 125, 139-140.

Under this theory, therefore, employees would be enabled to secure judicial review of an unfavorable award or of one less favorable than they had hoped. The statute makes no provision for such a review and accordingly the employees would be able to invoke any form of judicial

procedure which would be appropriate to test the award and to accord them the relief which they might claim. In such an action, the plaintiffs would be subject to the rule of administrative finality and could not prevail unless they were able to establish that the decision of the Board violated their constitutional rights, exceeded the statutory authority of the Board, or was rendered upon inadequate proof.*

While it is theoretically possible for a carrier to present cases to the Adjustment Board, as a matter of fact the carriers do not do so. The reason is easily understood. It is the carriers who apply the collective bargaining agreements on their properties and interpret them in the course of such application. Naturally no carrier is likely to protest its own decisions or precipitate a dispute regarding them.

It is probably academic, therefore, to consider the situation in which employees find themselves in a case where a carrier has taken a dispute to the Adjustment Board. Inasmuch, however, as the court has invited us to give full consideration to all legal possibilities, we will discuss this question briefly.

As we noted above, in order to consider the awards of the Board as possessing absolute finality, there must exist a right of election in the party against whom the awards are issued. Where a carrier presents a case to the Board, naturally no such election is made by the employees. We conclude, therefore, that in such a situation, the employees would have a right to judicial review subject to the limitations of the doctrine of administrative finality.

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* It should be stated here that railroad labor has never insisted upon the existence of a right to review the awards of the Adjustment Board upon suits filed by employees. The above discussion, therefore, is designed more for the sake of completing the legal picture than for that of pressing a vital claim.

EFFECT OF PHRASE "FINAL AND BINDING" AS RESTRICTING A CARRIER'S RIGHT TO REVIEW TO THAT AVAILABLE IN A STATUTORY ENFORCEMENT ACTION

The normal controversy which develops in connection with an Adjustment Board award arises when the award is against the carrier and the latter refuses to comply. Under such circumstances, to what extent is the award final and binding in connection with judicial review proceedings?

Following the same line of reasoning as that advanced above in the case of the employees, it might be plausibly argued that if a carrier had elected to pursue an administrative course by submitting a case to the Adjustment Board, it would be absolutely bound by the results. This conclusion would follow were it not for the fact that the statute provides that awards are not to be self-enforcing against the carriers, and must be enforced, if at all, in actions specially provided for that purpose. In the course of such an action judicial review may be had. The carrier is thus given the option by statute to ignore the award, if it so desires, without legal consequences to itself, and to stand upon its legal rights and await suit. No distinction is made by the statute between situations where the adverse award has been rendered as a result of the carrier's own invocation of the Board's services or where it resulted from a proceeding instituted by employees. The reason is probably to be found in the fact that the carriers were not expected to resort to the Board to any great extent and the facts reveal that this expectation was justified.

Accordingly, we conclude that as to awards against carriers, no difference in the scope of review nor in the degree of finality of such awards was contemplated by the statute, depending upon whether the carrier or the employees presented the dispute to the Board. If no such

difference was intended, it follows that the Board's award in any case must be accorded no greater degree of finality than it would possess in a case where no election of remedies was possible in the first instance. Otherwise stated, we conclude that the degree of finality of such an award as against a carrier will not be governed by the answer to the court's first question, but that this issue must be decided as though the doctrine of primary jurisdiction applied.

It will be remembered that, as to employees, we concluded that it was the intent of Congress to give to the awards of the Board the highest degree of finality consistent with constitutional limitations. If such awards were self-executing without the necessity of judicial enforcement proceedings, the Constitution could probably be satisfied only by permitting some form of non-statutory review at the suit of a carrier. Inasmuch, however, as the awards of the Board have no legal effect until such an effect is given them in an enforcement action, the constitutional rights of the carriers may be fully protected in such an action.

The above discussion has been devoted primarily to a consideration of the significance to be attached to the phrase "final and binding" during the two-year period provided by Section 3 First (q). We have concluded that Congress intended this expression to render the awards of the Adjustment Board as nearly final as is permissible under the Federal Constitution. If the party asserting a right of review has enjoyed an election in the first instance between administrative and judicial procedure, he may properly be held to have waived his right to judicial determination. If so, he is bound by the award which he sought and secured without any right of review unless such a right is provided specifically by statute. No such provision is made as to employees but carriers are secured a judicial

review by Section 3 First (p) in any event. As to one having no election of remedies, administrative finality only may be imputed to an award. Carriers may secure judicial review in the course of suits filed under Section 3 First (p); hence, there is no constitutional reason for according them added opportunity of review through non-statutory actions. If, as we have concluded, it was the intent of Congress to give to awards of this Board finality up to the limits of constitutional propriety, then the opening up of a non-statutory method of attack not required by the Constitution robs the awards of the degree of finality contemplated by the statute.

We have already pointed out in our former brief (pages 44-47, inc.) that Section 3 First (p) of the Act attaches to awards of the Board certain procedural consequences, which may be realized only in the course of a statutory enforcement action. These consequences are such as to place a carrier resisting enforcement at a disadvantage and their obvious purpose is to discourage such resistance. We do not propose to discuss this point again at length, but merely call the court's attention to the fact that the statutory provisions in question establish a measure of what might be termed practical finality for the awards of this Board in enforcement actions, and are hence relevant in connection with any interpretation made of the phrase "final and binding." It is apparent that if means of review other than that provided by statute are made available to carriers for the purpose of testing the propriety of awards, this "practical finality" will be lost and a degree of finality attributed to the awards lesser in extent than that contemplated by Section 3 First (m).

Effect of Phrase "Final and Binding" as to the Scope of Review Available in a Statutory Enforcement Action

In addition, however, to the effect which the words "final and binding" have in preventing a carrier from prosecuting a non-statutory review action, they have also an added effect upon the scope of judicial review in enforcement actions. We concluded above that in an action which might be brought by employees, they would necessarily give to an award of the Board administrative finality and we submit that they have the same effect in an enforcement action. This contention, of course, brings us face to face with the language of Section 3 First (p), where it is provided that an enforcement action "shall *proceed* in all respects as other civil suits, except that *on the trial* of such suit the findings and order of the division of the Adjustment Board shall be *prima facie evidence of the facts* therein stated, and except that the petitioner shall not be liable for costs in the District Court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, * * *. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of the costs of the suit."

The phrase *"prima facie"* is, of course, the most significant one in the above quotation insofar as our present discussion is concerned, but the balance of the statutory provision is quoted as showing the general nature of all of the restrictions which are placed upon enforcement actions. It is apparent that the provisions in question are designed as rules of procedure. They govern the "trial" of such cases, establish a rule of evidence and relate to the administration of the court in the matter of costs and attorney

fees. They are not intended to have substantive effect as to the scope of judicial review.

Were the phrase "*prima facie*" to be considered alone without reference to the provisions of Section 3 First (m), which attaches finality to the awards of the Board, it might be considered as substantive. The words "final and binding," however, are so clear in their meaning as to take precedence over other language which can be interpreted as purely procedural. It is obvious that the same award cannot at the same time be both final and binding, and *prima facie* in a substantive sense. In order to avoid an otherwise serious conflict in meaning between the two phrases, therefore, it is necessary to interpret the one as substantive, the other as procedural. Considered in this light, the "*prima facie*" provision is effective merely to govern the burden of proof, the weight of the evidence, and the order of procedure in an enforcement action. The court, however, in considering the merits of the case, must still accord to the awards of the Board the effect prescribed by the rule of administrative finality, and may not set such an award aside unless the Board has exceeded its constitutional power or statutory authority, or has proceeded "without regard to the basic prerequisites of proof."*

In summary, therefore, it is our conclusion that the phrase "final and binding" has two definite legal effects in connection with the rights of judicial review during the

* Section 3 First (m) provides for finality of awards of the Adjustment Board "except insofar as they shall contain a money award." It should be noted that the statutory exception is not directed against all terms of such awards as may incorporate directions for the payment of money but is limited to the money features alone. Thus, the *amount of money* due is the only factor which is not accorded finality and which would presumably be open to independent investigation on the part of the court. All other items of such awards are given the same degree of finality as in other cases. Accordingly, we do not consider the exception as being a matter of any considerable significance in determining the effect of this provision upon the availability and scope of statutory review, save only on the question of the amount of damages to be granted a claimant.

two-year period provided by Section 3 First (q). In the first place, it limits the types of procedure by which such review may be secured, to those required by the Constitution, or specifically provided by the statute. As to employees, this means that if the primary jurisdiction doctrine does not apply, they have no right to judicial review of awards sought by them, while if it does apply, or if the right of election is exercised by the carriers, then they probably have a right to such review. As to the carriers, there is no constitutional requirement for review because the awards of the Board are not self-enforcing and accordingly, they should be limited to the statutory method provided. The second legal effect of this phrase is that of confining the scope of any judicial review which may be secured within the limits of administrative finality and thus of restricting the issues open to the consideration of a review court to those of constitutional right, compliance with the statute, and the fundamental prerequisites of proof.

Effect of Phrase "Final and Binding" After the Two-Year Period Has Expired

As to the question of the finality of awards of the Adjustment Board after the two-year period of limitation has expired, in relation both to the right to resort to the courts and the scope of judicial review, we believe that our position will be more easily explained after we have discussed the Court's Third Question, which deals with the general effect of the two-year period of limitation and, therefore, will defer any consideration of this point until a later stage in the brief. See the note on page 38 for this discussion.

THIRD QUESTION:

The Effect of the Expiration of the Two-Year Period Specified by Section 3 First (q) Upon the Right of Either Party to the Dispute to Obtain a Determination of It in the Courts.

The exact language of Section 3 First (q) is as follows:

> "All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after." (U. S. C. Title 45, Section 153 First (q).)

Obviously any enforcement action brought pursuant to Paragraph First (p) of Section 3, is "based upon the provisions of this section" within the meaning of the above quoted language, and must be brought if at all within two years of the effective date of the award and order sought to be enforced. Petitioner, in its brief, argues that an enforcement action is the only one which can be subject to this provision. This position appears to us to be clearly untenable. If Congress intended to so limit the operation of Paragraph (q), it could easily have done so by stating expressly that it referred only to actions based on awards of the Board, to enforcement actions, to actions based on Section 3 First (p), or some similar phraseology. The fact that it did not so restrict the coverage of this paragraph but chose to apply the limitation it created to all actions "based on this *section*," is evidence of the existence of a broader intent. The Adjustment Board is established by Section 3 of the Railway Labor Act. Its jurisdiction, its procedure, the legal effect of its awards are all governed by Section 3. It is certainly not unreasonable to conclude that any action designed to test the validity of any such award is "based upon the provisions" of this section.

In our discussion of the Court's Fourth Question above, we have considered the possibility that employees

may be able to bring an action for judicial review of an award unfavorable to them. If the employees may indeed do so, it is our conclusion that such an action would be as much subject to the two-year period of limitations as an enforcement action brought under Section 3 First (p).

It follows, therefore, that an award and order of the Adjustment Board would be subject to neither judicial enforcement nor attack by suit filed by the employees more than two years after its effective date. The question still remains, however, as to the rights of the parties to secure a judicial determination of the *dispute* out of which the Board's award arose after the expiration of this two-year period.

Before attempting to answer this question, it is essential that we have a clear understanding as to the meaning of the word "dispute." It is clear that the statute does not employ this term to refer to a mere disputation or disagreement. Section 3 First (i) of the Act provides that "disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements * * * including cases pending and unadjusted on the date of approval of this Act, * * * may be referred * * * to the * * * Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes." This language clearly indicates that the word "dispute" was used to refer to a controversy analogous to a case in court, arising between adversary parties, growing out of existing facts and presenting definite and specific issues for decision.

Thus, while the word "dispute" may in ordinary usage refer to any disagreement between individuals, this statute attaches to it a more limited and specific meaning. In consequence, it is entirely possible that a difference of opinion may exist between a carrier and its employees as

to the interpretation of an existing contract which disagreement may give rise to a single dispute or to a series of disputes.

When a "dispute," in the statutory sense, is referred to the Adjustment Board by the employees, and a favorable award and order is secured, it is our understanding of the statute that the employees are thereafter limited in their choice of judicial relief to an action to enforce, or perhaps, to set aside *the award*. As we have already pointed out in our discussion of the Court's Fourth Question, employees who seek and receive an award from the Adjustment Board are bound by such an award, however distasteful it may be to them. This binding force is absolute, if they have sought administrative relief as a result of the exercise of the right of election between it and a judicial remedy, while if they have no such election, the binding force of an award is limited to the requirements of administrative finality and it is subject to judicial review. In either case, however, the employees' opportunity for judicial relief extends only to the enforcement or the review *of the award*. If the employees lose their right to enforcement by failure to file suit, the award is terminated, and the "dispute" is terminated with it. If employees fail to protest an unfavorable award in the courts for two years (assuming that they have the right to make such a protest) the award becomes final and again the "dispute" comes to an end. The employees have no further opportunity to submit it to judicial determination because it no longer exists in a legal sense.

While we have approached this question from the point of view of legal actions available to employees after the two-year period has expired, the same conclusions follow as to the carriers. Where a carrier has had an award issued against it with which it has not complied for two years, it cannot be compelled to comply by suit filed there-

after. Hence it cannot seek a judicial determination of the original dispute because that dispute is no longer an active controversy sufficient to confer jurisdiction upon the courts.

Where an award in favor of a carrier has become final through failure on the part of the employees to seek a review (if such review is available), the carrier obviously cannot file a judicial action after the two years because it has no basis for complaint. The winning party cannot appeal.

Our conclusion is therefore that after the expiration of the two-year period, neither party to a "dispute" which has been submitted to the Adjustment Board may seek a judicial determination of it.

We have limited the above discussion to a consideration of the term "dispute" in the technical sense in which it is used in the Railway Labor Act. We are not oblivious of the possibility that the court may not have intended to so limit the word in its question.

As was noted above, it is entirely possible that a single disagreement between carrier and employees regarding the interpretation to be given to some portion of their contract may lead not to a single dispute but to a series of them. This case presents such a situation. Petitioner and respondents are in disagreement as to the meaning of their contract. The petitioner has applied it according to its interpretation. The respondents have presented claims based upon their interpretation. Certain of those claims were consolidated into a "dispute" and submitted to the Adjustment Board. An award was issued. The carrier refused to comply. Two years have elapsed. According to the conclusions above developed, the original dispute is now ended. We do not believe that either it or the individual claims of which it was composed could now be made the basis of judicial action by anyone. However, if further claims have been made since the expiration of the two-year

period, these could be made the basis of a *new dispute.* Such a dispute could be submitted to the National Railroad Adjustment Board by either party. It could also be submitted to the courts if it is held that the primary jurisdiction rule does not apply as to this Board, or if the courts should decide to make an exception to this rule in this peculiar sort of situation. As we interpret the statute, however, this would be the only way in which a disagreement between carrier and employees, once passed upon by the Adjustment Board, could be brought before the courts after the end of the two-year period of limitations.

Summarizing the foregoing, therefore, it is our conclusion that the expiration of the two-year period specified in Section 3 First (q) terminates the rights of the parties to obtain a judicial determination of the "dispute" which was decided by the award. Under certain circumstances, however, and depending upon the answer given by the court to the First Question, it may be possible for one or the other of the parties to secure such a determination upon a new dispute, arising out of the same disagreement as to the interpretation of the contract which caused the original dispute.

Is Present Case Moot? The present case, of course, was filed during the two-year period, but comes before this court after the expiration of that period. The question, therefore, arises as to whether the case has become moot. The classical statement of the principles which govern the decision of this question is to be found in the opinion rendered by this court in the case of *Mills vs. Green,* 159 U. S. 651, where the court said:

> "The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which

cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal."

The petitioner, in its pleadings filed in the District Court, endeavored to establish the existence of an actual case or controversy by alleging that certain claims had been filed against it or would be filed, based upon the award of the Adjustment Board. As we have shown above, no claim predicated upon that award can now be asserted against the petitioner for the reason that the award itself has ceased to exist as a basis of liability. Hence, it might be argued with some force that the very claims upon which the action is predicated can no longer endanger the petitioner, and that the case has become moot.

We do not understand, however, that the law relating to moot controversies is so technically limited. This court in several cases has passed upon questions of law on appeal even though the particular fact situation originally imperiling the plaintiff had ceased to exist. Such decisions have been rendered in cases where there has been great public interest in the result, and where exactly similar situations presenting the same legal questions were likely to arise again in the immediate future.

The case of *Leonard vs. Earle*, 279 U. S. 392, was a mandamus action wherein the plaintiff endeavored to compel the issuance of a license to do business without meeting all of the statutory requirements. The requirements not met were asserted to be unconstitutional. The period which would have been covered by the license applied for had expired before the case reached the Supreme Court. The

plaintiff, however, intended to continue in this same line of business and would have required successive licenses for each succeeding year. This court said, in the course of its opinion:

> "Considering the nature of the controversy and the agreement between the parties touching appellants' purpose to continue in the packing business, it cannot be said that the cause has become moot."

In the *Leonard* case, the court cited several other cases in support of its decision, among them that of *Southern Pacific Terminal Company vs. Interstate Commerce Commission*, 219 U. S. 498, which involved the validity of a cease and desist order of the Commission, which, however, had expired according to its terms before the Supreme Court considered the case. (The effective period of the order was two years.) The court held that there was a substantial public interest involved in the case and recognized further that if the action were held to be moot, it would be possible for the Commission, by issuing successive short term orders, to prevent any effective review. It was accordingly decided that the case was not moot.

This case presents substantially the same situation as those cited. The contract out of which the controversy originally developed is still in existence. Petitioner obviously intends to continue business and does not indicate that it intends to make any different application of the contract in the future than it has in the past. Accordingly, further challenges of its action may arise which may in turn be submitted to the Adjustment Board and further awards may be issued. If so, exactly the same situation would be presented as that which is involved in this case. Furthermore, even if this development should not occur, other awards are constantly being issued by this Board in other disputes which present the same basic problems of review as those which are involved here. It is important

that these problems be settled. If this court is held to be foreclosed from considering this case by reason of the expiration of the two-year period, it is highly doubtful if a similar case could ever be presented here which could decide the issues raised. The processes of trial and successive appeals can seldom be completed within two years. Apparently the consequences of holding this action to be moot would be to deny permanently to these very important questions opportunity of decision in this court.

It is submitted, therefore, that the court should not consider the action as being moot, but should pass upon and decide the substantive issues which have been fully presented and argued by the parties.

Generally summarizing the discussion of the court's Third Question, our conclusions are that:

(1) No judicial determination may be secured by either party to a "dispute" (used in the statutory sense) which has been made the basis of an award by the Adjustment Board, after the two-year period of limitations has expired.

(2) It is possible that a new dispute, based on the same general disagreement between the parties as to the interpretation of their contract, but on new acts of the carrier committed since the expiration of the two-year period, might be made the basis of judicial proceedings, depending upon the decision of this court as to the applicability of the primary jurisdiction rule.

(3) Where an award has been made by the Adjustment Board, a suit filed within the two-year period seeking an independent judicial interpretation of the contract on which the award was based, does not become moot at the expiration of the two-year period.

Note—In light of the above discussion, we believe that our position will now be clear regarding the last phase of the Court's Fourth Question, as to the "final and binding"

effect of an award of the Adjustment Board after the two-year period has expired. An award in favor of a carrier becomes absolutely final at the end of this period because if it is subject to challenge by the employees at all, the opportunity to make such a challenge is terminated.

An award against a carrier loses its legal effect at the end of two years and hence loses whatever degree of finality the statute gives it. The termination of the period of limitation, however, invests it with a sort of reverse finality because thereafter neither it nor any claim of right recognized by it may be enforced by judicial action.

SECOND QUESTION:

Whether the Board May Make an Award Ex Parte if One Party to the Dispute Does Not Appear Before the Board, and if so, the Effect Given by the Statute to Such an Award.

If the National Railroad Adjustment Board can make no awards against a party unless he appears before it, the opportunity is given to defeat the provisions of the statute at will by failing to enter an appearance in any pending case. We know of no precedent for a proposition to the effect that any party otherwise subject to the jurisdiction of an administrative agency may defeat that jurisdiction merely by absenting himself from its hearings. Accordingly, it is our position that the National Railroad Adjustment Board may make an award if one party to the dispute does not appear before it.

The statute draws no distinction between an award made against a carrier as a result of proceedings in which it participated voluntarily and an *ex parte* award, and we believe that none was intended. If any lesser effect were to be attached to an award made *ex parte*, a premium would be placed upon a failure to participate in the administra-

tive proceeding, which, to the extent of such premium, would nullify the intent of the statute for the same reasons as stated in the last preceding paragraph. It would certainly not be consistent with public policy to permit any party to lessen the effect of an administrative ruling by refusing to participate in a procedure established by law.

Insofar as the employees are concerned, there may be some difference in the degree of finality of the award, and hence in the right to, and scope of judicial review, depending upon whether the employees have elected to invoke the services of the Board (assuming that they have a right to make such an election). This matter has been considered in the course of the discussion of the Court's Fourth Question above, and will not be reconsidered here. If, however, a dispute is before the Board on the petition of the carrier, we do not believe that the effect of any award made would be governed by the fact that the employees did or did not participate in the hearing held.

While the above discussion might serve as a categorical answer to the Court's Second Question, we realize that its import is somewhat deeper. The Court of Appeals for the District of Columbia, after concluding that to permit the carrier in this case to secure an extra-statutory review would nullify essential purposes of the Railway Labor Act, made the following additional statement:

> "The foregoing considerations are reinforced by the fact that the carrier, under the decision in *Moore vs. Illinois Central R. R., supra*, can bring its suit on the contract, independently of the statute, prior to the time when the dispute is submitted to the Board. Until then, at least, it has its election to pursue the exclusively judicial remedy or to follow the administrative and judicial one provided by the Railway Labor Act. When it chooses the latter, we think it is bound to follow it through to the conclusion prescribed by the statute. Such a choice is made, we think, not only when the carrier submits or joins in submitting the dispute to the Board, but when, under submission by an employee, it appears

before the Board and participates in a full hearing on the merits. Having done these things, had the chance of a favorable decision, and finally, when it has lost, been confronted only with an order not enforceable except by a suit which has not been brought, which it seeks in effect to forestall by this one, and in which, if begun, it would have had a full day in court, plaintiff cannot complain that it has not had complete opportunity to protect its rights or that they have not been protected adequately." (R. 345.)

While the court thus draws support for its decision from the fact that the carrier participated actively in the proceeding before the Board, it obviously employs this argument as reinforcing a conclusion already reached. The paragraph quoted is in the nature of an "aside."

The carrier now contends that its appearance before the Adjustment Board should not be construed as in any sense voluntary or as constituting an election of a statutory administrative procedure in preference to judicial procedure which might have been considered by it as available. With this contention, we are disposed to agree. Where a party must defend or take the risk of having a decision issued against him on presentation by the other side, we see no basis for presuming that he has made an election.

As above noted, however, the language quoted from the court's opinion was not necessary to the court's decision, and even if considered to be erroneous, would not justify reversal.

CONCLUDING STATEMENT

We have discussed above the four questions propounded by the court from every point of view which has suggested itself to us. While many of the matters considered have no immediate relevancy to the specific issues of this case, they are significant in that they provide a background against which those issues may be viewed in proper perspective.

The conclusions reached present a balanced and equitable pattern of review for the awards and orders of the Adjustment Board. Reduced to summary in outline form, the pattern is as follows:

I. Review Available to Employees—As to awards issued against them or awards in their favor which do not grant all of the relief to which they consider themselves entitled.

A. *Awards secured at the petition of employees.*

1. *If the primary jurisdiction rule does not apply*—The statute provides no method of review in such cases and all constitutional requirements are met by the fact that employees have an option to proceed through either administrative or judicial channels. By electing the former, they waive their right to judicial determination of the controversy.

2. *If the primary jurisdiction rule applies*—No method of review is provided by statute but one is probably required by the Constitution and could be secured through any form of appropriate action, limited, however, to the issues permitted under the doctrine of administrative finality.

B. *Awards secured on petition of a carrier*—Whether the primary jurisdiction rule applies or not, there has been no election here by the employees to submit themselves to administrative procedure, and hence no waiver of a right to judicial determination. Judicial review is therefore probably available as a matter of constitutional right, its scope, however, limited by the considerations of administrative finality.

II. Review Available to Carriers—As to awards issued against them.

A. *Awards secured on petition of employees*—Regardless of whether the primary jurisdiction rule applies, there has been no election by the carrier to submit to the administrative agency and no waiver of the right of judicial determination. Review is available as a matter of constitutional right. Such review is provided for in the course of enforcement procedure which is a necessary prerequisite to the imposition of legally enforceable obligations upon the carriers. This procedure, being adequate to protect all legal rights of the carriers, is an exclusive one. Carriers are made subject to all of the limitations of that procedure set up in the statute and in addition, awards of the Board should be considered as possessing administrative finality.

B. *Awards secured on petition of a carrier.*

1. *If the primary jurisdiction rule applies*—The carrier, having no right of election, has a constitutional right of review which is accorded it under the statute, as indicated in II A above.

2. *If the primary jurisdiction rule does not apply*—The carrier in this situation would have no *constitutional* right to review because of the fact that it had elected to pursue the administrative channel. A right to review, however, is granted in Section 3 First (p) of the statute, the scope of such review being the same as that indicated under II A above.

Note 1: While the existence of a right of election may determine the right of the electing party to secure a judicial review of an award, such an election is not made by an appearance before the

Board in a proceeding instituted by the other party. The effect of an award made *ex parte* is no different from that of any other award.

Note 2: The expiration of the two-year period of limitation provided in Section 3 First (q) terminates all opportunity which an award may have to ripen into an enforceable obligation against a carrier. It also terminates any right which the employees may have to attack it. Thus, all right to review at the suit of either party is ended. No judicial determination may be secured by suit filed thereafter as to the "dispute" which the award decided. There may, however, be a right to seek a judicial determination of the disagreement between the parties if a new dispute develops therefrom after the expiration of the statutory period.

In our earlier brief, the more restricted consideration given to this case led us to the conclusion that the only method of review available to a carrier as a means of testing the validity of a decision of the Adjustment Board is to await suit on the order according to the statutory procedure. This conclusion was based in the first place on the general legal principle that where an administrative order cannot become legally obligatory without judicial proceedings in which it may be reviewed, such method of review is adequate to protect the rights of the parties and further, that where the statute provides an adequate method of review for administrative orders, such method is held to be exclusive; and in the second place, our conclusion was based on a consideration of the language and purposes of the Railway Labor Act, in connection with which we pointed out that an extra-statutory review at the suit of a carrier would serve to impair or destroy the legal effect of the

awards of the Adjustment Board under Section 3 First (p) and would, to that extent, nullify the statute. These conclusions are in no way contradicted by those reached in this brief.

As already pointed out above, if the court should now decide that the administrative procedure of the National Railroad Adjustment Board is an exclusive one which, by its existence, precludes primary resort to the courts as a means of securing interpretations of collective bargaining agreements between carriers and employees, an added reason is provided for concluding that the prescribed statutory method for reviewing awards against carriers is likewise exclusive.

The fact that decisions of the Board are made "final and binding" by the statute is evidence of an intent that they may not be disregarded or by-passed by carriers through the device of filing a non-statutory action which would have the effect of re-examining all issues passed upon by the Board, thus robbing the awards of the finality imputed to them. We have pointed out that there may be some differences of opinion as to the degree of finality of such awards. They may be considered absolutely final against employees who elected to pursue the administrative remedy available. They may be considered as having administrative finality only, supplemented by the effects conferred upon them by statute in Section 3 First (p). Whatever the conclusion reached, the purposes of the statute may be fully realized only by restricting the review of awards against a carrier to that established by the Railway Labor Act.

The fact that the award in this case was rendered after a hearing in which the carrier participated neither strengthens nor weakens the conclusion that the statutory method of review is exclusive. While the lower court mentioned the carrier's participation in the proceeding as a factor supporting its decision, the main current of reason-

ing of the opinion leads to the same result, regardless of this fact.

The conclusion reached above to the effect that the employees' rights to enforce or attack an award of the Board and their rights in connection with the "dispute" terminate with the end of the comparatively short period of two years, affords an equitable counterbalance to the principal conclusion that carriers may not during that period seek a non-statutory review through any suit wherein they might act as plaintiffs.

In conclusion, it is submitted, therefore, that under whatever basic theory we proceed, the same result is reached, *i.e.*, that an award against a carrier may be fully reviewed in the course of the statutory proceeding provided for its enforcement; that such method of review is constitutionally adequate to protect the legal rights of carriers, and that it is exclusive. Any other conclusion would deprive the awards of the Board of the effect which the statute contemplates. It is submitted, therefore, that this action was improperly brought, and that the judgment of the lower courts should be sustained.

Respectfully submitted,

MULHOLLAND, ROBIE & MCEWEN,
Attorneys for Respondents.

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Of Counsel.

APPENDIX

EXCERPTS FROM "HEARINGS BEFORE THE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, HOUSE OF REPRESENTATIVES, 73d Congress, 2d Session, on H. R. 7650." Pages 58 to 64, Inc.

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Mr. Pettengill. Mr. Eastman, at the bottom of page 17, it says that the award shall be final and binding upon both parties to the dispute, excepting insofar as they shall contain a money award.

Is it your interpretation that that language, by implication or argument, would make a strike unlawful?

Commissioner Eastman. That is the same language which, as I recall it, is in the present act with reference to decisions of boards of adjustment on grievances. The present act also provides that if the parties agree to arbitration of a major issue, then the decision of the board of arbitration shall be final and conclusive.

Now, the only difference here is that there is provision for preventing deadlocks on an adjustment board by the appointment of a neutral member.

Mr. Pettengill. And, this act does not make a matter of agreeing to arbitrate a matter of discretion? It makes it a matter of duty on the part of the parties to this dispute.

Commissioner Eastman. Yes; and it is my understanding that the employees in the case of these minor grievances—and that is all that can be dealt with by the adjustment board—are entirely agreeable to those provisions of the law.

I think that is a very important concession on their part. It does not go to the major issues with reference to wages and working rules; but to all disputes except working rules and wages.

Mr. Pettengill. Well, does it not apparently make binding the award on all matters except insofar as they pertain to wages?

Commissioner Eastman. The only jurisdiction that the adjustment board has is over these minor grievances.

Page 58 Mr. Pettengill. Well, I know that we all indulge the hope that matters as important to the public as uninterrupted train service shall not be interrupted if possible, and that means shall be provided so that those strikes may not happen; but I am not prepared to go far as to say that labor shall, by law, be required to abandon that ancient weapon which has been recognized by the United States Supreme Court over and over again.

Mr. Wolverton. Is that not provided for in the proviso to section 2 reading:

> *Provided*, That nothing in this act shall be construed to require an individual employee to render labor or service without this consent, nor shall anything in this act, be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent.

It would seem as though this provision would cover the thought you have in mind.

Mr. Pettengill. Well, when he has joined an organization and has selected a representative and the representative has submitted an award, then he has consented to it, has he not?

Mr. Wolverton. Theoretically I would say yes; but I understood you to go beyond that in making your inquiry.

Page 59 Mr. Eastman yesterday seemed to be of the opinion that there is nothing in this bill that calls for compulsory arbitration or that could be taken to enforce a decree against a labor union. They would still have the right to strike.

Mr. Pettengill. That is the question that I am raising. I do not want to take the time this morning.

Mr. Merritt. Any consent under this bill must be subject to that provision; that is, concerned with the proviso on page 10.

Mr. Wolverton. I have merely expressed the impression I received from the statement made by Mr. Eastman yesterday. I may be wrong in that.

Commissioner Eastman. Well, I was talking yesterday about a dispute which arises as to who is the representative of a particular group of employees.

Mr. Wolverton. Yes. Page 59

Commissioner Eastman. Now, that is the provision in paragraph 9 in section 2.

Mr. Wolverton. Yes.

Commissioner Eastman. In my answer to you I said there was nothing in the act which provided for the enforcement of those particular decisions. That answer would not apply to decisions of the adjustment board, and they are made final and binding by the terms of this act, and as I understand it, the labor organizations, none of them, are objecting to that provision. They have their day in court and they have their members on the adjustment board, and if an agreement cannot be reached between the parties representing both sides on the adjustment board, a neutral man steps in and renders the decision, and they will be required to accept that decision when made, with respect to these minor matters. They are not the major issues which arise in the labor world. It has to do with the settlement of these grievances. Page 16 defines the disputes which are to be referred.

> The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions.

Now, the proviso on page 10 protects the individual who wants to walk out but it does not cover collective action in walking out.

Mr. Pettengill. Your interpretation there, Mr. Commissioner, would be that under the language at the bottom of page 17, although the individual may be free to walk out, the organization would not be free to call a strike after an award had been made on these matters that are covered by the language at the bottom of page 17.

Commissioner Eastman. Well, that is my understanding; yes, sir.

Mr. Cooper. Mr. Pettengill, what would be the use of having these boards if both parties do not abide by their decisions?

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Mr. Pettengill. I am not arguing the point, Mr. Cooper. I am just asking for the interpretation of the Commissioner of his understanding of the law, and if it is his interpretation that it does make a strike illegal.

Mr. Cooper. I cannot see the sense of going ahead and setting up boards and have the carriers and employees go before these boards, if they do not agree to abide by the decision of the board and the neutral member that may be brought in.

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Mr. Lea. Under that proviso, in the tenth subdivision, do you take it that that draws a distinction between an individual quitting his employment and the employees agreeing collectively to quit?

Commissioner Eastman. Yes, sir. As I recall that, in the original form it was in, it had something about collective action and it was changed to this language which is the language in the present railway labor act. It is the same proviso as is in the law now.

Mr. Lea. The emergency act made collective action the same, or put it on the same basis as individual action, did it not? It placed collective action on the same basis as individual action in quitting employment.

Commissioner Eastman. I do not recall that there was anything in it. Well, there was something in the emergency act about that; yes, sir. The proviso in the emergency act is:

> *Provided*, That nothing in this title shall be construed to require any employee or officer or any carrier to render labor or service without his consent, or to authorize the issuance of any orders requiring such service, or to make illegal the failure or refusal of any employee individually, or any number of employees collectively, to render labor or services.

Now, of course, they were not dealing in this with the settlement of disputes between the carriers and the employees. The question was whether the Coordinator could order certain employees to keep on working.

Mr. Cooper. Mr. Chairman, may I ask the Commissioner just one more question, because I want to get this thing very clear?

The Chairman. Yes.

Mr. Cooper. Do I understand this paragraph then on page 17, in which it says, "the awards shall be final and binding upon both parties to disputes," would that prevent a railroad employee or an organization from striking, if they saw fit? Would it be a violation of the law if they did that? Page 60

Mr. Pettengill. Could an injunction issue to prevent them from doing it?

Commissioner Eastman. I cannot tell you what the legal procedures would be in enforcing the award, where it is against the employee. Paragraph (p) covers the case where a carrier does not comply with the order of the adjustment board.

Mr. Cooper. Would it apply to either carrier and/or employees? Now, if we go that far are we not writing something new into the law of the land to deprive the employees of rights which they already had?

Commissioner Eastman. Well, as I say, you have exactly similar provisions in the present labor act with respect to decisions by adjustment boards and where they agree to arbitration, and this law is in effect an agreement on the part of the parties to arbitrate all of these minor disputes.

The Chairman. Was that not one of the reasons, to try to keep down strikes to get people together?

Commissioner Eastman. Yes. It is a very important part of it. The willingness of the employees to agree to a provision of that sort seemed to me to be a very important and praiseworthy thing.

Mr. Cooper. Well, I fully approve of that method, Mr. Commissioner, and I say that if they are going into these boards and are willing to go in there, why probably they ought to abide by the finding of the board; but I do not know whether I would want to go so far as to say that if they do not agree to it that it would be a violation of law. Page 61

Mr. Wolverton. Does this act in any way, Mr. Eastman, provide that it will be a violation of law if they do not comply with the decree and the order that is made?

Commissioner Eastman. It says that the award shall be final and binding.

Mr. Wolverton. Does this bill attempt in any way to

Page 61 enforce that provision; and if so, is it contrary to public policy to put such a provision in the bill?

Commissioner Eastman. Page 19, line 19, it says:

> The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the adjustment board.

Mr. Wolverton. Is there any provision in this bill that would enable the court to obtain an injunction against a labor organization which is dissatisfied with the final decree and refuses to comply with it?

Commissioner Eastman. Well, I am not able to give you an answer to that. That is a legal question, to be frank with you, that I have not gone into.

Mr. Wolverton. It would seem to me that the provisions or language of the bill itself would answer that question. And is it contrary to public policy to have such a provision in there?

Commissioner Eastman. Well, it is my own opinion that there ought not to be strikes with reference to minor grievances of that sort. I should be very unwilling to take away from the employees the right to strike on major issues, but these are not major issues.

Mr. Wolverton. The provision which I read a few moments ago protects the individual employee so that no court can order him to work, and no court can issue an injunction preventing him from striking nor in any way prevent the free exercise of his own individual discretion as to whether he shall work or not work.

Is there any language that is equally clear with respect to the organizations? I understand you are not certain that the language would apply to any other than an individual.

Commissioner Eastman. Well, I think that the carrier can enforce the order. For instance, if the order provides that certain working rules shall be interpreted in the same way, the carrier, of course, can apply the rule in that way.

Now, the only question I am in doubt about is whether or not there should be an injunction under this act to prevent a strike. Now, I am not clear about that.

Mr. Wolverton. Do you think that there should be such a provision in the bill? Page 61

Commissioner Eastman. I would rather see it carried out without that, because I do not believe you are going to have that question arise.

Mr. Wolverton. Do you consider it better policy to leave it out—

Commissioner Eastman. Well, no particular question has been raised about this matter of enforcement.

Mr. Wolverton. Let us first have a frank understanding as to whether it is included or is not included in the bill and then we can determine the policy as to whether it should be or should not be in the bill; but it certainly seems to me that the bill ought not to be left indefinite either from the standpoint of the carriers or the standpoint of the employees. We should know just what the situation is. Page 62

Commissioner Eastman. I think I would prefer that my legal adviser, Mr. Carmalt, who has been working on this bill for me, be asked that question. If you will ask him what he thinks about that.

Mr. Carmalt. It seems to me at least arguable that a strike might be enjoined under the provisions of this law, that is to say, a strike called because of failure to comply with an adverse decision of the judgment of the Board in favor of the carriers against the employees.

Mr. Wolverton. How would an injunction of that kind be directed—to the officers of the organization or the membership?

Mr. Carmalt. To the employees, I take it.

Mr. Pettengill. Well, may I ask a question?

The Chairman. Yes, Mr. Pettengill.

Mr. Pettengill. You say that you take it that it is arguable that an injunction might issue to enforce the award, and would not that injunction then be binding upon every individual if a member of an organization that had participated in the hearing?

Mr. Carmalt. Well, Mr. Pettengill—

Mr. Pettengill. What is the use of an injunction directed against some names, unless it includes the members of the organization and would not make nugatory the ex-

Page 62 emptions at the bottom of page 10, which attempts to protect the individual?

Mr. Carmalt. That clearly means individuals in case of the grievances, and the injunctions, I should take it, would run against the individuals who were the claimants.

Mr. Cooper. Well, in that respect, Mr. Pettengill, there may be 10,000 individuals involved in the particular controversy.

Mr. Pettengill. That is correct.

Mr. Cooper. So it seems to me that an injunction would apply to all of those connected with that part of the railroad work which was being arbitrated.

Mr. Wolverton. Was it the purpose in this act to confer the right to enjoin an organization from disputing a decision made by the Board?

Mr. Carmalt. The original House bill on this question was drawn by the employees and the language was, I think, brought directly over in the same form that the employees presented it.

The question has not arisen therefore, before this morning, and I am more or less thinking out loud in connection with it, because of that fact, but it has seemed to me that the implication lay, from the form of the bill, that a strike on account of these minor grievances would not be permitted and might be enjoined.

Now, as to against whom the process should run, I have not thought it through; but presumably it would run against anybody that was endeavoring to make nugatory the findings of the Board.

Mr. Wolverton. There is no doubt in your mind that the provisions of the bill are broad enough to take any kind of action against a carrier to compel, either by injunction or mandamus, its compliance with an order that has been made; is that right?

Page 63 Mr. Carmalt. That is right.

Mr. Wolverton. Now, does the same power exist with respect to the other parties? Has this question been left open purposely, or has it been overlooked, or what has been the policy in the drawing of the bill?

Mr. Carmalt. No. It was felt there were individual grievances involved, that the carrier had the power in its

hands to enforce the awards of the Board as against the individual; that is, the individual judgments that are rendered by the Board.

Now, the question of strikes had not arisen in connection with it until this morning.

Mr. Wolverton. Is it your opinion that there should be such a provision in the bill or not?

Mr. Carmalt. I hesitate to talk, effecting a policy in that regard—

Mr. Wolverton. I am only asking you to express your opinion.

Mr. Carmalt. My opinion is that there should not be right to strike over grievances of this kind where the Government has provided the machinery whereby the grievances may be considered by an impartial board.

Mr. Wolverton. Do you think that the language that has been referred to by Mr. Eastman, as conferring this absolution, so to speak, so far as an employee is concerned, would provide equal protection to the organization itself?

Mr. Carmalt. No; I think this injunction would run rather as against a strike. There is no other means of resisting the order. But, as to an individual quitting, I think the absolution would be effective.

Mr. Wolverton. Do you think that the absolution that has been given the employee should likewise be given to the organization?

Mr. Carmalt. Oh, no.

Mr. Wolverton. What?

Mr. Carmalt. No.

Mr. Wolverton. What did you say?

Mr. Carmalt. No. The employees, in their drafting of the bill, put that absolution in, and in redrafting the bill we took the language of the present act which would not give that absolution to the organization.

Mr. Wolverton. So then you assume that under the provisions of this bill an injunction could issue to prevent an organization from going on strike?

Mr. Carmalt. Such an injunctive process as might be necessary to prevent the strike growing out of the settlement of grievances under section 3, I should believe would lie.

Page 63 Mr. Wolverton. Then the bill has been drawn purposely so that it would have that effect, so far as the organization is concerned but not so far as the individual is concerned?

Mr. Carmalt. I would not say that it gives any authority in that regard, because it was assumed that would be true, I think, but there has been no discussion of it until this morning. .

Commissioner Eastman. I may say, so far as I am concerned, it had not seemed to me that matter was a contingency of importance, because I cannot conceive of organizations striking over the settlement of grievances, particularly when they had been passed upon by an impartial tribunal under Government auspices.

Page 64 It is a serious enough thing to strike when a major matter is involved; but when you have only minor grievances and they have had full opportunity to be heard and have had their day in court before a tribunal, it hardly seemed to me that that was a question that was likely to arise. My own idea would be, let that question arise out of experience and find out whether there is actual need for any such power before you provide for issuing injunctions for preventing strikes.

Mr. Wolverton. Mr. Commissioner, that may be true. Maybe that is a proper course to pursue, but what I am seeking to find out is whether this language declares something else to be the policy.

Commissioner Eastman. Yes.

Mr. Wolverton. And, I am endeavoring to find out just what the language of this bill does provide, so that we may know what policy we are adopting. It may be that a hands-off policy is what we should adopt, but in that case, I do not want to see something in the bill that carries a different effect. That is the purpose of my questions, in trying to find out definitely what is the purpose or effect of the provisions in this bill.

Commissioner Eastman. I shall be glad to give the matter study and let you know just what my opinion is upon it.

Mr. Cooper. Mr. Chairman—

The Chairman. Mr. Cooper.

Mr. Cooper. Mr. Commissioner, I cannot just agree that all of these disputes outside of the salary questions are minor. You may have some very big question come up that does not affect the salary at all. Page 64

Commissioner Eastman. I am not saying that salary is the only question.

Mr. Cooper. Or, the question of wages. But, that was referred to. Strikes might be called over a minor dispute. Well, I would not like to see that. But, there may be some big questions that they are concerned about and I am concerned about this, to know whether we are writing into law, for the first time in the history of this country, into this bill, a provision which would make it unlawful for a labor organization or a group of laboring men to leave their employment if they desire to do so.

Commissioner Eastman. Mr. Cooper, do not make any mistake about this: You have referred to wages. The whole matter of working rules and conditions is not within the jurisdiction of this adjustment board. They have no right to determine what the working rules shall be. It is only the interpretation of whatever rules are agreed upon. It is a question of interpreting them. It is minor matters of that kind, and not the questions either of wages or of working rules. The basic matters are left for the processes of mediation.